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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD–DIVISION OF JUDGES

REGION 21

XPO Cartage, Inc. (Respondent) and INTERNATIONAL BROTHERHOOD OF TEAMSTERS (Charging Party)	**CASES 21-CA-150873; 21-CA-164483; 21-CA-175414; 21-CA-192602**
XPO Port Services, Inc. (Respondent) and INTERNATIONAL BROTHERHOOD OF TEAMSTERS (Charging Party)	**CASES 21-CA-150878; 21-CA-163614; 21-CA-169753**

CHARGING PARTY'S OPPOSITION TO MOTION TO HOLD CASE IN ABEYANCE

I. Introduction

Respondents' motion to hold two cases in abeyance until some indeterminate time in the future is not based on the National Labor Relations Board's (the "Board") Rules and Regulations nor on any accepted Board legal doctrine. Instead, it is based on nothing but speculation and

cynicism: speculation about whether or not a new General Counsel will even be appointed and a cynical belief that if a new General Counsel is appointed by a new administration, he or she will automatically discount a valid legal theory that was reached after months and months of consideration by the current General Counsel and his staff. Respondents' speculative and cynical arguments, if given any validity, would lead to an administrative agency that is immeasurably hampered in its ability to do its main delegated task—enforce the National Labor Relations Act and the rights protected under that Act. Respondents' argument that the hearings in these cases would be unacceptably lengthened by including the allegation that misclassification is an 8(a)(1) violation is equally unavailing—whether or not that allegation is part of the complaints, this Judge will have to decide the fact intensive employee status question.

Therefore, lacking any valid rationale, Respondents' motion seeks nothing more than to deprive the current General Counsel of his authority in order to unjustly continue delaying these cases and to allow Respondents to continue violating the Act. For these reasons, Charging Party respectfully requests that the Judge reject Respondents' Motion to Hold the Case in Abeyance and instead procced with the two XPO hearings as scheduled.

II. Argument

A. Neither the Board's Rules nor Case Law Justify Respondents' Unfounded Attempt to Indefinitely Delay these Cases

In its Motion, Respondents fail to cite any case where a decision has been made to postpone proceedings in order to wait for a new General Counsel to be appointed. Respondents also fail to cite any authority for the proposition that a General Counsel loses his ability to continue doing the job he was appointed to do merely because a new President has been elected. Respondents, instead, cite Rule 102.16(a), stating that the Regional Director can extend or change the hearing time or place "upon proper cause shown by any other party." Respondents,

however, have not put forth anything coming even close to "proper cause"—they have only put forth bare speculation and a cynical, politicized version of the Board process as alleged justification for their abnormal request.

Respondents speculate that a new General Counsel will take office this year. As an initial matter, there is no guarantee that there will even be a new General Counsel—the current President could very well decide to reappoint Richard Griffin. Even if the President does decide to replace Richard Griffin, however, there is no guarantee that it will happen in November. In fact, the current President's actions with respect to other vacant positions, including at the Board itself, strongly imply that the President *will not* have anyone lined up to take over as General Counsel as soon as Richard Griffin's term expires.

Currently, there are two vacancies on the Board itself that have been open since before the November 2016 presidential election. The President has now been in office for nearly six months and has not yet had any new members confirmed to the Board. In fact, the President has not even nominated anyone to fill those two open positions. Further, as of the end of April, Trump had not nominated anyone at all to fill "470 of 556 key positions that require Senate confirmation."[1] As of June 9, 2017, 426 of these positions remain without a nominee.[2] This complete failure to timely nominate individuals to key positions, including at the Board itself, makes it extremely unlikely that the President will nominate someone to replace the current General Counsel any time soon.

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[1] *Trump's Biggest Unfilled Jobs*, Politico (last accessed June 11, 2017) *available at* http://www.politico.com/agenda/story/2017/04/25/top-unfilled-jobs-trump-administration-000426

[2] *Tracking How Many Key Positions Trump Has Filled So Far*, The Washington Post (last accessed June 11, 2017) *available at* https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?tid=a_inl

Furthermore, once an individual is nominated for the General Counsel position, the confirmation process would likely take several additional months. This can be seen in the President's nominees to his own cabinet—citing the nominees' lack of "experience or expertise in the areas they will oversee," Democrats in the Senate have taken longer to confirm the President's cabinet nominees than with any other President in modern history.[3] This means that even if the President does nominate someone to the General Counsel position, it is unclear when—or if—that nominee would actually assume the duties of the General Counsel.

This uncertainty over if or when a new General Counsel will actually take office would immediately doom Respondents' motion even if there were some support for Respondents' argument that a new General Counsel is otherwise a valid basis for delaying the adjudication of a case. Respondent, however, fails to provide any such basis and the Board's caselaw directly contradicts Respondents' argument.

In *Tree of Life*, an already appointed and confirmed new General Counsel requested to file a supplemental position statement in a case that had already been heard. 336 NLRB 872, 875 fn. 3 (2001). The Board granted the motion because no party opposed the motion and no party would be prejudiced by the filing of the supplemental position statement. *Id.* In doing so, however, Member Liebman cautioned that "[s]he would not routinely grant motions, like the present one, which are based solely on the fact that the General Counsel has changed."[4] This is because such motions "would threaten to increase the burdens of the parties and the Board and to delay proceedings." *Id.* That is exactly what would happen in this case if Respondents' motion

[3] *No President Has Ever Waited This Long to Get a Cabinet Approved*, CNBC (last accessed June 11, 2017) *available at* http://www.cnbc.com/2017/02/24/trumps-cabinet-waiting-for-confirmation.html

[4] This motion was discussed in a footnote and Member Liebman concurred in granting it.

was granted—drivers have been waiting for years since the unfair labor practice charges in these cases were first filed in April 2015. Complaints in these cases did not issue until July 2016. Since then, the hearings have continued to be significantly delayed and have been rescheduled because of the difficulty in coordinating schedules. Any additional delay increases the time that the drivers remain excluded from the Act by virtue of their misclassification as independent contractors, chilling their protected concerted activity and threatening to destroy the protected organizing drives that have been undertaken by these drivers.

Member Liebman recognized that "the views of a new General Counsel [may] differ from his predecessor's." *Id.* However, in those situations, "he ordinarily should be required to await the next regular opportunity to present his position." *Id.* This sentiment is echoed in cases where the Board makes clear that it "will not entertain any request for reconsideration of Board action based solely on the ground of a change in composition of the Agency's membership." *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1236, 1239 (1954); *see also e.g., Re UFCW Local No. 1996*, 338 NLRB 1074 (2003). Granting parties reconsideration or allowing them to indefinitely delay cases because of changes to the Board or to the General Counsel—especially in situations like this one where those changes are speculative and there is no clear timeline—would invite advocates in every case to seek to delay or to seek reconsideration based solely on their preconceived beliefs about the positions that newly appointed individuals will take. This would cripple the Board, leading to an inefficient system and prejudicing the very employees whose rights the National Labor Relations Act was intended to protect.

B. Respondents' Motion Improperly Attempts to Litigate the Merits of the Underlying Allegations in This Case

Respondents spend much of their motion addressing the very merits of the allegations contained in the XPO cases, particularly what it refers to as the "novel" theory that an employer

violates the Act by misclassifying its workers as independent contractors—independent contractors who are excluded from the protection of the Act by the very text of the Act. At this stage, it is completely inappropriate for Respondents to attempt to influence the Judge by arguing the merits of these charges and to attempt to have the Judge pre-judge the strength of the allegations contained in the complaints.

Respondents spend pages discussing the Advice Memorandum that the General Counsel's Division of Advice issued in *Pacific 9 Transportation*. As an initial matter, this Advice Memorandum is tangential to the case at hand. While this memorandum is one place where the General Counsel has applied and explained its theory that misclassification is a violation of Section 8(a)(1), the theory of the violation stands alone. In GC Memorandum 16-01, the General Counsel requested that all cases "involving the question of whether the misclassification of employees as independent contractors violates Section 8(a)(1)" be referred to the Division of Advice.

As such, the Region submitted these very cases to Advice and a determination was made that Respondents did violate the Act by misclassifying its drivers—a determination that was made based on the specific facts of *these* cases and based on the evidence that Charging Party has presented in *these* cases, not on a memorandum issued in an unrelated case. By hanging its hat on challenging the *Pacific 9 Transportation* memorandum, Respondents insult and belittle the General Counsel's long and reasoned deliberative process that leads to a complaint being issued. Further, the General Counsel has also pursued this "novel" theory in other cases and these XPO cases are not the first cases to make it to hearing. Although *Pacific 9 Transportation* settled, Charging Party also filed charges against Intermodal Bridge Transport, Case Nos. 21-CA-157647 and 21-CA-177303. The Division of Advice also reviewed that case, and a

complaint issued which included the allegation that Intermodal Bridge Transport violated the Act by misclassifying its drivers as independent contractors. A hearing was held, the parties submitted briefs, and the administrative law judge is in the process of issuing a decision.

To the extent that the reasoning in the *Pacific 9 Transportation* memorandum does support a finding of a violation in these XPO cases, Charging Party completely disagrees with Respondents' assertions regarding that memorandum. It is utterly inappropriate, however, to utilize a pre-trial motion in these XPO cases to discuss or elaborate about why or why not Respondents have violated the Act based on the reasoning in *the Pacific 9 Transportation* memorandum. Such an argument is appropriate for a post-hearing brief, once all the evidence has been presented to the Judge who will be making that decision. Similarly, Respondents' farcical argument that the misclassification of an employee is protected speech under the Act is completely improper in this motion. Suffice it to say, Charging Party completely disagrees with Respondents' reading of the caselaw.

The strength of the underlying allegations cannot and should not form a basis for postponing a case. Making such a merit determination absent a presentation of evidence deprives all parties of due process and indeed, by inappropriately making such arguments in its motion, Respondents improperly attempt to influence the Judge on the merits of these cases. What really matters in these cases is that Charging Party has presented a prima facia case for multiple violations of Sections 8(a)(1) and 8(a)(3) of the Act (not *just* the "novel" theory Respondents focus on). The Region and the General Counsel have extensively investigated and considered these various allegations and have concluded that a complaint should be issued. A hearing has been scheduled. The General Counsel remains in office and maintains its positions that XPO has violated the Act. Nothing else has occurred that would justify further postponing this case to the

detriment of the drivers and the Charging Party. Therefore, this Judge should deny Respondents' motion and should hear the cases against both XPO companies as scheduled, in July, September, and October 2017.

C. The "Novel Theory" In this Case Will Not Significantly Increase the Time and Resources that Will be Spent Adjudicating This Case

Respondents also spend much of their motion arguing that allowing the case to move forward with the included allegation that Respondents have violated Section 8(a)(1) by misclassifying their employees would immensely increase the amount of evidence that must be presented and the length of the hearing. Respondents argue that removing this "novel" allegation from the complaint would result in a much shorter and more streamlined hearing. In making this argument, Respondents either completely misunderstand Board law in general or are attempting to mislead the Judge in this case. Even without the "novel" allegation that Respondents points to, this case will require an extensive amount of evidence to be presented. As such, removing the "novel" allegation would make virtually no difference to the length of the hearing.

This is because it is not the "novel" theory that makes these cases evidence and time intensive—it is the Board's employee status test itself. As Respondents admit on page five of their motion, "the Board requires factfinders to undergo intensive balancing of eleven distinct factors before determining that a worker is a statutory employee covered by the NLRA." This fact intensive analysis comes into play *any time* a determination regarding employee status has to be made, not just when that determination is tied to a "novel" theory. And, because the Board only has jurisdiction over "employees" and not "independent contractors," the Board must make that determination every time an unfair labor practice is committed against an individual who an employer has labeled an "independent contractor."

In these two XPO cases, there are many alleged unfair labor practices aside from the "novel" theory that Respondents focus on in their motion. Because these allegations involve many drivers who have been labeled independent contractors, the Board will have to engage in the intensive employee status analysis even if the "novel" theory were removed from the case—making the hearing as long and involved now as it would if a new General Counsel were to change his mind about the "novel" theory next year or two years from now. Further, because the remedies such as a notice posting and notice reading apply to an entire employee workforce, the employee status question cannot be limited just to specific drivers who were the subject of specific unfair labor practices—the determination must be made for the workforce as a whole.

This can be seen in the *Green Fleet Systems* case decided by Judge Wedekind. 2015 WL 1619964, Case 21-CA-100003, 2015 L.R.R.M. 180798 (NLRB Div. of Judges, Apr. 9, 2015). That case did not involve the "novel" theory present in this case, and only two drivers who were labeled "independent contractors" were alleged 8(a)(3) discriminatees. There were, however, numerous 8(a)(1) violations as well as these 8(a)(3) violations that affected the entire workforce.[5] Rather than limit the evidence regarding employee status to just the two misclassified discriminatees, Judge Wedekind heard testimony from many misclassified drivers presented both by the General Counsel and by Respondent. That hearing ended up spanning nineteen days and, in his decision, Judge Wedekind found that *all* the drivers labeled "independent contractors" were misclassified, not just the two discriminatees.

The hearing in this case would therefore be equally involved whether or not the "novel" theory is included in it. If anything, the only additional time that would be taken up by this

[5] That case involved an Employer who had both properly classified employee drivers, and misclassified drivers who it called independent contractors.

"novel" theory would be at the briefing stage. The fact intensive employee status question will have to be addressed whether or not the "novel" theory is included. The only addition required by the "novel" theory would be the purely legal question of whether misclassification, when it exists, violates Section 8(a)(1) of the Act. This legal question would only require minimum additional work in a brief. Accordingly, Respondents' disingenuous argument regarding "economic and judicial efficiency" should be completely discounted and the hearing should not be postponed any further.

D. The *Murphy Oil* Allegations in This Case Also Do Not Form a Basis for Postponing These Hearings

In a footnote, Respondents point to OM Memorandum 17-11 as justifying postponing the hearing. This memorandum addresses pending cases that include *Murphy Oil* allegations involving arbitration agreements that bar collective claims. It is true, as Respondents point out, that such cases "may be held in abeyance" and that the Region is directed to hold such cases in abeyance in certain circumstances.

This memo, however, also states that:

> To the extent any charge contains both an allegation that the employer has been maintaining and/or enforcing an unlawful *Murphy Oil* agreement, as well as an allegation unrelated to said agreement, Regions are to propose that the parties enter into an informal settlement agreement relating to the Murphy Oil allegation(s) conditioned on the Agency prevailing before the Supreme Court. **To the extent charged parties are unwilling to settle the unrelated allegations, Regions should go forward on those found to have merit. (emphasis added)**

Therefore, by the very terms of the memorandum, the Region should attempt to enter into a conditional settlement with Respondents regarding their arbitration agreement. However, if Respondents are unwilling to enter into a settlement, the Region should move forward with the case. Both cases here include many allegations unrelated to the *Murphy Oil* allegation, and the *Murphy Oil* allegation should not be used to further delay the adjudication of these other charges.

Even if this Judge were to find that the *Murphy Oil* allegation in this case should be held in abeyance, all the other allegations should move forward. This can easily be accomplished by severing the *Murphy Oil* allegation from the rest of the allegations and holding just that allegation in abeyance. This option would not even require an additional hearing—it is undisputed that these arbitration agreements exist. The parties could stipulate to the fact that the agreements were accurate and were presented to drivers. Then, a hearing would be unnecessary and the parties would only spend time briefing the issue—time that would also be spent briefing the issue if the allegations were not severed. Further, because of the importance of this case and the delay that has already occurred, if there is no other option, Charging Party would even be willing to withdraw the *Murphy Oil* allegation to ensure that the rest of the allegations are adjudicated without postponing the scheduled hearings.

III. Conclusion

Respondents have not provided any valid basis for postponing the current cases. Instead, they have cynically imagined a Board where decisions are based on nothing more than politics and where a Republican General Counsel is immediately going to come in and reverse every position held by the previous Democratic General Counsel. This insults the work done by the Board in interpreting and enforcing the Act, and minimizes all their deliberate efforts to nothing more than a fight between conservatives and liberals. This is not how the Board does, or should, function. While political affiliations undoubtedly play some minor role in decisions, the underlying functions of the Board and the General Counsel, no matter who appoints them, is to enforce the Act. This is not a political task.

In this case, a validly appointed General Counsel, well within his term, determined that misclassification can violate Section 8(a)(1) of the Act. The Region has conducted extensive investigation, determining that Respondents' drivers are misclassified and that such

misclassification violates the Act. The General Counsel remains in office today—and will do so for at least another five months, with no guarantee of when, or even if, he will be replaced. It is now the Judge's job in this case to hear the evidence and to make a determination on the merits of the General Counsel's theory. Respondents should not be allowed to interfere in that process based on nothing more than speculation and cynicism.

Allowing Respondents to do so would be untenable. It would mean that immediately after any Presidential election, all work done by any agency would cease. This brings justice to a halt and would threaten to make the Board thoroughly irrelevant. Respondents' motion should therefore be denied and the XPO cases should be heard by this Judge as scheduled.

DATED: June 12, 2017

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 801 North Brand Boulevard, Suite 950, Glendale, California 91203.

On June 12, 2017, I served true copies of the following documents described as **OPPOSITION TO RESPONDENT'S MOTION TO HOLD CASES IN ABEYANCE** on the interested parties in this action, as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address SBrennan@BushGottlieb.com to the person(s) at the email address(es) listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on June 12, 2017, at Glendale, California.

SHERYL BRENNAN

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